Supreme Court, U.S.
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No. 99-43

IN THE
SUPREME COURT OF THE UNITED STATES

ROGER TIMOTHY BAST, Individually and as Personal Representative of the Estate of Rhonda Rae Fleming Bast; and DOUGLAS GLENN BAST, a Minor Child,
Petitioners,

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REASONS FOR GRANTING THE WRIT

The question presented by the instant case concerns when under section 502(a) of ERISA a court may order monetary relief. The petition sets out the three-part standard applied by the Ninth Circuit, and explains how each element of that standard has been rejected by other circuits. Respondent does not dispute our characterization of the particular, albeit divergent, criteria applied in the various courts of appeal.

Respondent does insist, quite correctly, that the standards in question have been utilized by the courts of appeals in determining the availability of remedies for a wide variety of different claims, involving such diverse subjects as medical benefits, pension plans, subrogation claims, and misrepresentations. (R.Br.Opp. 9-11). Respondent does not explain, however, how this circumstance militates against review by this Court. More specifically, respondent does not contend that the phrase "equitable relief" means something different with regard to a medical plan that it does, for example, with regard to a pension plan. The Ninth Circuit itself did not suggest that the relief available under section 502(a) would depend on the subject matter of the claim; to the contrary, in rejecting petitioners' claim regarding medical benefits, the court below expressly relied on prior Ninth Circuit decisions involving pension plans and subrogation. (App. 20a)

Respondent does not defend, or even refer to, the actual reasoning of the Ninth Circuit in this case. Respondent does not, for example, contend that the relief sought in the instant case was really legal rather than equitable in nature (App. 19a) or discuss the Ninth Circuit's somewhat idiosyncratic definition of equitable restitution. (App. 20a). Instead, respondent advances with regard to the merits of petitioner's claim an argument which it never made in the courts below and which neither the Ninth Circuit nor the District Court ever considered. Even if the remedy sought in this case is indeed "equitable relief" within the meaning of section 502(a)(3)(B), respondent now argues, petitioner cannot seek <u>any</u> equitable relief at all under section

502(a)(3)(B), because on respondent's view the exclusive remedy available under ERISA was for Ms. Bast to sue for injunctive relief during the five months when respondent was reconsidering its September 1991 denial. (R.Br.Opp. 8, 11-12). In this Court respondent for the first time insists that the possibility of such emergency litigation would constitute an "adequate" remedy for a mortally ill patient in the position of Ms. Bast. Neither of the courts below, however, were ever asked to address the legal or factual issues raised by that contention. Because this novel argument was never presented to or considered by the courts below, it cannot provide a basis for denying review of the actual decision of the Ninth Circuit, or even an alternative ground for affirmance if review is granted.

Respondent insists that the courts of appeals are all "in agreement" regarding "the legal issue presented in this petition." (R.Br.Opp. 14). But the appellate decisions to which respondent refers have nothing to do with the legal issue actually decided by the Ninth Circuit in this case or set out in the petition itself. Respondent does not contend, for example, that the cases on which it relies discuss the difference between legal and equitable relief or the nature of unjust enrichment. Rather, respondent claims only that those cases support its new argument that Ms. Bast was obligated to file suit as soon as she was diagnosed. None of the cited cases support that novel legal theory. The most relevant of these cases hold that a plaintiff with an available claim under section 502(a)(1)(B) may also sue under section 502(a)(3)(B) if she is seeking different remedies under the two provisions.[1] The declaratory and other relief which respondent now insists

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[1] *Conley v. Pitney Bowes*, 176 F.3d 1044, 1047 (8th Cir. 1999) (section 5029(a)(3) claim barred only if the plaintiff is also seeking "the same remedy" under section 502(a)(1)); *Hall v. LHACO, Inc.*, 104 F.3d 1190, 1197 (8th Cir. 1998) (plaintiff with viable section 502(a)(1) claim can also proceed under section 502(a)(3) because she is seeking "'different' relief" under the latter provision); *Wald v. Southwestern Bell Customcare Medical Plan*, 83 F.3d 1002, 1006 (8th Cir. 1996) (plaintiff seeking relief under section 502(a)(1) in Count I of her complaint cannot in Count II seek "no different relief" under section 502(a)(3)).

Ms. Bast should have sought under section 502(a)(1) are clearly different remedies than her section 502(a)(3) unjust enrichment claim.[2]

Respondent objects at length that petitioner's allegations "were not established in the district court" (R.Br.Opp. 1), and are not supported "in the record" (R.Br.Opp. 1-3)[3]. But that, of course, is a result of the procedural posture of the case. The complaint was dismissed because the courts below agreed with respondent's contention that petitioner would not be entitled to relief even if she could prove everything that she had alleged. Respondent responded to the complaint with a motion to dismiss for failure to state a claim on which relief can be granted; the argument in that motion was ultimately accepted by the district court. The parties agreed to postpone discovery until this dispositive

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[2] The other cases cited by respondent provide no support for its new legal theory.

In *Wilkins v. Baptist Healthcare System*, 150 F.3d 609, 615 (6th Cir. 1998), the court held that a plaintiff whose claim for benefits under section 502(a)(1)(B) had been rejected on the merits could not seek relief based on the same claim in an action under section 502(a)(3)(B). Two of the cases cited by respondent merely hold that damages are not "equitable" relief, a proposition not in dispute in this case. *Turner v. Fallon Community Health Plan*, 127 F.3d 196, 200 (1st Cir. 1997); *Corcoran v. United HealthCare Inc.*, 965 F.2d 1321, 1335 (5th Cir. 1992). The issue in *Coyne & Delaney Co. v. Blue Cross & Blue Shield*, 102 F.3d 712, 715 (4th Cir. 1996), was whether an employer has standing to sue on behalf of an employee who has been improperly denied benefits.

[3] The complaint, for example, alleged that "[t]he expected cost of the procedure exceeded $200,000 . . . ." (Complaint, p. 4, par. 12.) In this Court respondent objects, "there was not evidence of any sort before the District Court regarding the projected cost of the proposed procedure much less to the effect that it was 'approximately $200,000.'" (R.Br.Opp. 2); *see id.* at 5 ("There was no evidence at all before the District court regarding the projected cost of the ABMT with HDC procedure"), 16 ("there is nothing in the record establishing what the projected cost of the proposed HDC with ABMT was.")

motion had finally been resolved; since the argument was resolved by the district court in favor of respondent, no discovery ever occurred.

There are, to be sure, unresolved factual disputes between the parties. Petitioner contends, for example, that the September 1991 denial of her request for preauthorization of the ABMT treatment violated her benefit plan; respondent insists its original decision was proper. (R.Br.Opp. 3). These are precisely the issues that would be the subject of discovery and trial if this Court were to hold that the underlying complaint indeed stated a claim on which relief could be granted.

Finally, respondent insists that even if the events alleged did result in unjust enrichment, the ultimate beneficiary of that enrichment was not respondent itself but Ms. Bast's employer, Cole National Corporation. That is so, respondent suggests, because on its view Cole would have been obligated to reimburse respondent if it had paid for the disputed treatment. (R.Br.Opp. 3, 6,16). Whether and to what extent respondent would have been entitled to such reimbursement is at this juncture unclear[4]. In addition, plan documents filed by respondent indicate that Cole would be obligated to reimburse respondent for any judgment awarded to petitioner in this case[5], thus placing the cost on the very party which respondent contends was actually enriched. If, as petitioner urges, unjust enrichment indeed occurred, the

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[4] Respondent was the excess insurer providing coverage to cover benefit payments in excess of a specified annual amount. Respondent insists that that annual amount was not reached in 1991 or 1992. (R.Br.Opp. 5-6). But respondent has never contented that that annual amount would not have been exceeded, and respondent itself therefore responsible for some of the ultimate case, if the plan had paid for the costly disputed ABMT procedure.

[5] Amendment to Group Contract No. G-52789A, unnumbered p. 9 ("If Prudential decides that no benefit is payable for a claim or for part of a claim, and if this decision results in a lawsuit, . . . [t]he Contract Holder [Cole] will pay any benefit amount included in a judgment or settlement.")

district court on remand would have no difficulty framing an appropriate remedial decree.

CONCLUSION

For the above reasons, a writ of certiorari should be granted to review the decision of the Ninth Circuit.

Respectfully submitted,

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